Federal Court  Cour fédérale

Date: 20220524

Dockets: IMM-4647-22
IMM-4646-22

Citation: 2022 FC 754

Vancouver, British Columbia, May 24, 2022

PRESENT: The Honourable Mr. Justice Roy

Docket: IMM-4647-22

BETWEEN:

ABDULBASIT ADEREMI AKINWUMI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-4646-22

AND BETWEEN:

EFE GREGORY EJINYERE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] These are two cases that were heard at the same time and were argued on the same basis. This Order and its Reasons will be filed in both cases. The two applicants will be referred to throughout as “the Applicants”.

[2] The Applicants seek a judicial stay of the execution of a removal order set for May 25, 2022. They came to the Court *in extremis*, but the Court chose to hear the matter in spite of its lateness, in view of the fact that the Applicants have known since March 14 that the removal order was to be enforced.

[3] These Applicants are citizens of Nigeria who came to Canada in April 2014 (Mr. Akinwumi) and August 2015 (Mr. Ejinyere) and never left. They both came to this country as students. After receiving an extension for their study permits, they were both found to be inadmissible in October 2020 for failing to abide by the conditions of their study permits. They both were without status since 2019. Indeed neither one is enrolled in school since 2019.

[4] The Applicants were offered an opportunity to apply for a Pre-Removal Risk Assessment [PRRA]. The applications were received by the Department of Citizenship and Immigration on January 13, 2021. A negative decision followed on August 18, 2021. Judicial review has been sought.

[5] The Applicants attempted to have their removal from Canada deferred by the Officer responsible for the enforcement of the removal. For a reason that remains shrouded in mystery, the deferral letter with respect to both Applicants, found in both of their motion records, is dated April 20, 2022, yet it appears that the request for deferral was communicated to the Removals Officer only on May 8.

[6] The reason given for the deferral is that the Applicants, because of their sexual orientation and the attitude of Nigerians towards same sex couples, will face personal harm if removed to Nigeria. Despite the fact that the PRRA addressed squarely the issue of the Applicants' sexual orientation, they contended that there was new evidence related to their sexual orientation. The Applicants argued before the Removals Officer that there were exchanges of text messages with the Applicants' fathers where threats were made. However, contrary to what was alluded to, these messages are not new. They happened well before the PRRA decision in August 2021; according to the letter seeking deferral, one salient exchange would have taken place on February 10, 2021.

[7] In a well written decision letter dated May 12, the Removals Officer rejects the request for a deferral. Having established that an Officer's discretion is very much limited by section 48 of the *Immigration and Refugee Protection Act* (S.C. 2001, c 27) [the Act], the Removals Officer conducts a detailed review of the immigration history of the two Applicants. The Officer considers the text messages presented by the Applicants, together with the negative PRRA decisions.

[8] The Removals Officer noted that the PRRA Officer concluded that the information concerning the sexual orientation of the Applicants lacked detail and was general. Many of the supporting letters were seen as following a template and being very short. Furthermore, they were not dated and it was not possible to identify and authenticate any of the authors.

[9] As for the text messages, they also suffer from similar deficiencies: inability to verify authenticity or who is actually involved. At any rate, the Removals Officer finds that if there are threats against the Applicants, they would be centralized in the area where the families reside. Nigeria having a population of upwards of 200 million inhabitants, the Applicants can decide to live in a different area of the country. The families have no way of knowing about the return to Nigeria unless the Applicants share the information with them. The fact that there is litigation concerning the PRRA decision is not a bar to the removal order being executed. All in all, there is nothing new from the PRRA decision that needs to be considered further.

[10] In order to succeed on a judicial stay of execution of a removal order, an applicant must satisfy the Court of the three-prong test for granting interlocutory remedies:

a) Is there a serious issue to be dealt with in the underlying judicial review?

b) Will the applicant suffer irreparable harm if the stay is not granted?

c) Where does the balance of convenience lie?

(RJR MacDonald Inc v Canada (Attorney General), (1994) 1 SCR 311*; Toth v Canada (Minister of Employment and Immigration),* (1988), 86 NR 302 (FCA)).

The test is tripartite; each branch of the test must be satisfied as each branch brings something different to the equation. In the case at hand, none of the branches has been satisfied. It will suffice to make a few observations.

[11] In *Wang v Canada (Minister of Employment and Immigration)*, [2001] 3 FC 682 [*Wang*], Pelletier J, then of this Court, found the burden on an applicant, such as in the case at hand, is to establish the likelihood of success of his argument. The rationale for that statement is found at paragraph 8 of the decision, where we read: "But where the motion for a stay is in relation to a refusal to defer removal, the fact of granting the stay gives the applicant that which the removal officer refused him/her." It follows that there exists an elevated standard to be satisfied by he who wants his removal deferred. The Court in *Wang* spoke of establishing the likelihood of success. The Federal Court of Appeal in *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 put it this way:

> [67] While I agree entirely with my colleague's approach to the "serious issue" prong of the tripartite test in the context of a motion to stay a removal order, I would add the following. In determining whether a serious issue exists so as to warrant the granting of a stay of removal, the Judge hearing the motion should clearly have in mind, first of all, that the discretion to defer the removal of a person subject to an enforceable removal order is limited, as explained in *Simoes*, above, and, particularly, in *Wang*, above. Second, the Judge should also have in mind that the standard of review of an enforcement officer's decision is that of reasonableness. Thus, for an applicant to succeed on a judicial review challenge of such a decision, he or she must be able to put forward quite a strong case. In my view, the appellants herein clearly did not have such a case to put forward.
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> [My emphasis.]

[12] Here, the Applicants contend that the Removals Officer conducted a credibility assessment in lieu of assessing their personal risk if removed. Actually, that is not what the Officer did. There was not a credibility assessment conducted. Rather, the Officer found that the review of the risk has been conducted through the PRRA. There was nothing new that could not have been brought before the PRRA officer. In fact, the quality of the "new evidence" was seen as less than persuasive. The burden on the Applicants to "put forward quite a strong case", in the words of the Federal Court of Appeal in *Baron*, was not met. That did not occur. The risk, if any, must have arisen after the PRRA. Nothing of the sort is present in this case and there is no serious issue. That is enough to dispose of the stay motion.

[13] The Applicants seem to rely also on the challenge to the PRRA decision (Written Case, paras 20-21). With all due respect the contention is misplaced. The Removals Officer rightly refers to the decision of the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, [2012] 2 FCR 133 [*Shpati*] where the Court found that there is no stay of execution of a removal order while there is a judicial review application of the PRRA decision pending. *Shpati* is also an authority for the proposition that if an applicant raises a new risk, it "must have arisen after the PRRA" (*Shpati* at para 44). As already mentioned, there is no new risk in this case.

[14] Another observation concerns the issue of irreparable harm. It is not enough to state that irreparable harm will ensue if the stay is not granted. A significant line of cases was endorsed in *Western Oilfield Equipment Rentals Ltd et al v M-I L.L.C.*, 2020 FCA 3 which establishes that much more is needed:

> [11] I begin with the remarks of my colleague Stratas J.A. found at paragraph 24 of his reasons in *Janssen*, where he sets out his understanding of the second branch of the test:
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> > On the irreparable harm branch of the test, the moving party must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm — not hypothetical and speculative harm — that cannot be repaired later: *Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraphs 47-49*; Laperrière v. D. & A. MacLeod Company Ltd*. , 2010 FCA 84 at paragraphs 14—22; *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126 at paragraphs 14- 16; *Glooscap Heritage Society*, *supra* at paragraph 31; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 at paragraph 12. Here again, it would be strange if a litigant complaining of harm it caused itself; harm it could have avoided or repaired, or harm it still can avoid or repair could get such serious relief. Similarly, it would be strange if vague assumptions and bald assertions, rather than detailed and specific evidence, could support the granting of such serious relief.
>
> [My emphasis.]
>
> [12] I agree entirely with Stratas J.A.'s understanding of the second part of the *RJR-MacDonald* test.

[15] Stratas J.A. had articulated the requirements in *Gateway City Church* thus:

> [14] Such a general assertion is insufficient to establish irreparable harm: *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General*), 2009 FCA 265 at paragraph 22. That sort of general assertion can be made in every case. Accepting it as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.
>
> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

(*Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 31.

[16] Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Glooscap*, *supra* at paragraph 31. See also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[16] In the case at hand, there is no evidence of irreparable harm at a level of particularity, let alone a convincing such level. In fact, there is nothing more than general assertions and assumptions. To quote from *Glooscap Heritage Society* again, "assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight". It follows that the irreparable harm branch of the tripartite test is not satisfied either.

[17] Finally, I note that the balance of convenience includes the need for section 48 of the Act to be applied. The Act speaks of the removal "order must be enforced as soon as possible". The integrity of the system of immigration is at stake, which translates into the loss of public confidence in the system, when prompt removal is not taken with the appropriate seriousness.

These Applicants have benefited from having a pre-removal risk assessment after having lost their immigration status three years ago. The balance of convenience favours the government.

[18] As a result, the tripartite test has not been satisfied and the motion for a judicial stay of the removal order to be executed on May 25, 2022 is dismissed.

ORDER in IMM-4647-22 and IMM-4646-22

THIS COURT ORDERS:

1. The motion for a stay of removal of the Applicants is dismissed.

2. The order and reasons are with respect to files IMM-4646-22 and IMM-4647-22.

   A copy of the order and reasons is to be put on each file.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-4647-22 AND IMM-4646-22
STYLE OF CAUSE:	ABDULBASIT ADEREMI AKINWUMI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS EFE GREGORY EJINYERE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY TELECONFERENCE
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